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No. 80-986

In the Supreme Court of the United States

OCTOBER TERM, 1980

THE NORTH HAVEN BOARD OF EDUCATION, PETITIONER

v.

SHIRLEY M. HUFSTEDLER, ET AL.

THE TRUMBULL BOARD OF EDUCATION, PETITIONER

v.

UNITED STATES DEPARTMENT OF EDUCATION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS

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QUESTION PRESENTED

Whether Sections 901(a) and 902 of the Education Amendments of 1972, 20 U.S.C. 1681(a) and 1682, authorize the Department of Education to issue regulations prohibiting sex discrimination in the employment practices of school districts and educational institutions receiving federal financial assistance.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 20A-48A-2) is reported at 629 F. 2d 773. The opinions of the district court in *North Haven* (Pet. App. 51A-75A) and *Trumbull* (Pet. App. 76A) are not officially reported.

JURISDICTION

The judgment of the court of appeals was entered on July 24, 1980. A petition for rehearing was denied on October 24, 1980 (Pet. App. 49A-50A). The petition for a writ of certiorari was filed on December 16, 1980. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTES AND REGULATIONS INVOLVED

1. The pertinent portions of the statute involved (Sections 901(a) and 902 of Title IX of the Education Amendments of 1972, 20 U.S.C. 1681(a) and 1682) are printed at pages 1A-8A of the petition.

2. The pertinent regulations (34 C.F.R. 106.51 and 34 C.F.R. 106.57) are printed respectively at pages 8A-11A and 15A-17A of the petition.

STATEMENT

These consolidated cases were brought by two Connecticut school districts to challenge the authority of the Department of Health, Education, and Welfare (HEW)[1] to issue regulations prohibiting sex discrimination in the employment practices of educational institutions operating federally assisted education programs and activities (Pet. App. 23A-25A).

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[1]The functions of HEW under Title IX of the Education Amendments of 1972 were transferred to the Department of Education by Section 301(a)(3) of the Department of Education Organization Act, Pub. L. No. 96-88, 93 Stat. 677, 678; and, in the court of appeals, the Secretary of Education was substituted as appellant in place of the Secretary of HEW. Because all of the relevant actions in this case were taken by HEW prior to the reorganization, it will be necessary to refer to that agency in addition to the Department of Education in this brief.

1. *North Haven.* The North Haven Board of Education receives federal financial assistance in support of its education programs and activities, and it is therefore subject to the provisions of Title IX of the Education Amendments of 1972, 20 U.S.C. 1681 *et seq.* (hereinafter "Title IX"), and to authorized implementing regulations promulgated by the federal departments and agencies through which it receives such financial assistance (Pet. App. 23A). Since the 1975-1976 school year, the school board has used a substantial portion of its federal financial assistance to pay salaries of its employees (*ibid.*).

On January 10, 1978, HEW notified North Haven that it had received a complaint alleging that the school district was in violation of Title IX in its hiring policies and in the terms and conditions of employment, and it requested that North Haven provide information concerning its policies on hiring, leaves of absence, seniority, and tenure (Pet. App. 23A-24A). North Haven refused to supply the requested information, asserting that HEW had no authority to regulate employment practices under Title IX (Pet. App. 24A). HEW then notified the school district that because of its refusal to provide information the matter had been referred to the appropriate office for possible administrative enforcement action (*ibid.*). Thereafter North Haven filed this action against the Secretary of HEW and certain regional HEW officials seeking a declaratory judgment that the regulations then contained in 45 C.F.R. Part 86, Subpart E (1978), which prohibit sex discrimination in the employment practices of federal education aid recipients, are in excess of the authority conferred by Congress under the statute.[2] It also

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[2]These regulations were recodified in 34 C.F.R. Part 106, Subpart E (1980), in connection with the establishment of the Department of Education, 45 Fed. Reg. 30802, 30962 *et seq.* (1980).

sought an injunction prohibiting HEW from attempting to terminate federal financial assistance to the school district based upon alleged noncompliance with Subpart E (*ibid.*). The parties filed cross-motions for summary judgment, and on April 24, 1979, the court granted North Haven's motion. Adopting the reasoning of the decisions of several district courts and of the court of appeals in *Islesboro School Committee* v. *Califano*, 593 F. 2d 424 (1st Cir.), cert. denied, 444 U.S. 972 (1979), the court held that the prohibitions of Title IX do not apply to employment practices (Pet. App. 51A-72A).

Summarizing the conclusions of the district court in *Romeo Community Schools* v. *HEW*, 438 F. Supp. 1021 (E.D. Mich. 1977), aff'd, 600 F. 2d 581 (6th Cir.), cert. denied, 444 U.S. 972 (1979), the court concluded (Pet. App. 64A, quoting *Romeo Community Schools* v. *HEW*, *supra*, 438 F. Supp at 1032) that the language of Section 901 of Title IX prohibits sex discrimination only against students and that "[t]eachers * * * are hard pressed to fit themselves within the plain meaning of § 1681's prohibitory language, general as it may appear on its face."

The court recognized that Title IX, patterned after Title VI of the Civil Rights Act of 1964, 42 U.S.C. 2000d *et seq.*, included no provision like Section 604 of Title VI, which excludes employment generally from the coverage of the statute; but it reasoned that such a provision was omitted from Title IX because it would have been inconsistent with other portions of the Title IX legislative package rather than because Congress intended employment to be covered under Section 901 (Pet. App. 61A-62A).

The court found further support for its reading of Section 901 in its conclusion that Congress could not have intended to provide for termination of federal financial assistance to a school district where there was discrimination against teachers but not direct discrimination against students (Pet.

App. 65A-66A). Finally, it concluded that Section 902 of the statute, which limits the effect of termination of assistance to "the particular program, or part thereof, in which * * * noncompliance has been * * * found" is inconsistent with regulation of employment practices, because they are not "program-specific" (Pet. App. 66A-67A).

2. *Trumbull.* Like North Haven, the Trumbull Board of Education receives federal financial assistance in support of its education programs and activities and is, therefore, subject to the provisions of Title IX and its implementing regulations (Pet. App. 24A). HEW investigated a complaint, filed under Title IX by respondent Linda Potz, a former guidance counselor in the Trumbull school district, alleging that Trumbull had discriminated against her on the basis of sex in job assignments, working conditions, and the non-renewal of her contract (*ibid.*). On September 20, 1978, HEW notified Trumbull that it had concluded that the school district was in violation of Title IX and requested that corrective action be taken (Pet. App. 25A).[3]

Trumbull declined to take the corrective action requested by HEW and instead, on October 18, 1978, filed this action seeking a declaration that HEW's Title IX employment regulations are invalid and an injunction forbidding HEW from attempting to enforce those regulations against the school district (Pet. App. 25A). The district court granted

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[3]Specifically, HEW found that Potz was required to perform tasks such as typing and running errands, which were not part of her duties as a guidance counselor and which male counselors were not required to perform, that her office was moved to a smaller, poorly heated and less comfortable space, in the gymnasium, away from other other counselors, and that she was asked to change a report showing that she had seen 150 students in a given week because the number was much higher than the number seen by her male colleagues. Finally, HEW found that Potz's sex was the motivating factor in the school district's decision not to renew her contract (Pet. App. 24A-25A).

Trumbull's motion for summary judgment on May 24, 1979, for the reasons set forth in its decision in *North Haven* (Pet. App. 76A).[4]

3. *The decision of the court of appeals.* The court of appeals consolidated the cases and reversed the judgments appeals consolidated the cases and reversed the judgments of the district court (Pet. App. 20A-48A-2). The court concluded that the legislative history and the purpose of the statute support HEW's interpretation of its language as prohibiting employment discrimination (Pet. App. 32A). The court noted that the remarks of the sponsor of the portion of the bill that became Title IX indicated an intention to prohibit employment discrimination through Section 901 of Title IX as well as through amendments to Title VII of the Civil Rights Act of 1964 and the Equal Pay Act, 29 U.S.C. 213(a) (Pet. App. 33A-41A). The court also relied upon conference committee action deleting a provision of the House bill similar to that contained in Section 604 of Title VI of the Civil Rights Act of 1964, which would have excluded most employment practices from the operation of the statute; it disagreed with the other courts of appeals that the deletion was made simply to avoid an internal inconsistency in the bill (Pet. App. 42A-43A).

The court found it "not without significance" (Pet. App. 43A) that Congress undertook a statutorily mandated review of the regulations and failed "to adopt resolutions, *along with bills and amendments*, specifically designed to exempt employment from HEW regulation after hearing arguments on both sides" (Pet. App. 46A, emphasis in original). The court further concluded that the fact that

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[4]Because the court granted summary judgment before respondent Potz had an opportunity to respond to Trumbull's motion, Potz filed a motion to set aside the judgment and a cross-motion for summary judgment. The district court denied both motions on September 13, 1979 (Pet. App. 77A-93A).

there is some overlap of jurisdiction in employment discrimination does not mean that Congress intended to exclude it from Section 901, but indicates instead that Congress intended both to give HEW the termination remedy and to provide additional remedies for individual employees under Title VII and the Equal Pay Act (Pet. App. 46A-47A).

The court rejected the argument that Congress could not have intended to penalize students because of discrimination against faculty members, observing (Pet. App. 47A) that the termination sanction would have this broad reach even if employment practices were not covered, since it can be used to terminate funds for a program benefiting many students even where the discrimination affects only a few. Given the "grave congressional concern over sex discrimination" in educational employment, the court concluded (*ibid.*) that Congress intended HEW to have the same authority to combat it as it has to combat discrimination involving students.

Finally, the court concluded that Section 902, limiting the effect of HEW's power to terminate funds to "the particular program or part thereof, in which * * * noncompliance [with the regulations] has been * * * found," is not a limitation on the power to prohibit employment discrimination by broad regulations (Pet. App. 48A-1-48A-2).[5]

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[5]Because of its decision that employment is covered, the court did not reach the question whether HEW has a narrower authority to issue regulations prohibiting sex discrimination against employees to the extent that such discrimination also constitutes discrimination against students (Pet. App. 48A-2).

DISCUSSION

The question presented in this case is identical to the question presented in *United States Department of Education* v. *Seattle University*, petition for certiorari granted December 1, 1980, No. 80-493, and it is similar to the question in *Hufstedler* v. *Dougherty County School System*, petition for a writ of certiorari filed December 22, 1980, No. 80-1023.

For the reasons set forth in our petition in *Seattle University*, we believe that the decision of the court of appeals in this case is correct. Because that petition raises the same question presented in this case, we would normally ask the Court to hold this petition pending its decision in *Seattle University*. However, following the grant of certiorari in *Seattle University*, the respondent University filed papers indicating its intent not to file a brief or participate further in the case because it believed there was no live controversy. The position represented by the opinion of the court of appeals in that case will therefore not be adequately presented to the Court in that case unless special measures are taken.

In response to a request from the Clerk, we expressed our views on this development by letter, dated January 6, 1981, explaining that we believed the mootness question had been fully aired in the Court before the grant of certiorari in *Seattle University* and that we would proceed with our briefing of that case.[6] We noted, however, that the Court might wish to appoint counsel as *amicus curiae* to file a brief in support of the judgment on review in that case, or to

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[6]We have previously provided a copy of the petition in No. 80-493 to all parties in this case. We are now providing to counsel for all parties copies of our petition in No. 80-1023 and our January 6, 1981, letter to the Clerk concerning Seattle University's motion to permit withdrawal of counsel.

vacate the grant of certiorari in that case and grant the petition either in the present case or in *Hufstedler* v. *Dougherty County School System*, No. 80-1023. (We also asked that, in the event the Court took the latter course, it hold the petition in *Seattle University* pending the decision in the case in which the issue was briefed and argued.)

We reaffirm that position here. If the Court decides that briefing and argument in *Seattle University* should go forward, then the petition in this case should be held for disposition in the light of its decision in *Seattle University*. (Similarly, if the Court were to grant the petition in *Dougherty County*, and decide the employment practices issue in that case, then this petition should be held pending the decision in *Dougherty County*.) If the Court decides instead to defer disposition of *Seattle University*, we would not oppose the grant of the petition in this case.

CONCLUSION

The Court should defer disposition of the petition in this case pending its decision in *United States Department of Education* v. *Seattle University*, No. 80-493, or its decision

in *Hufstedler* v. *Dougherty County School System*, No. 80-1023, should it grant the petition in that case. If the Court vacates its order granting the petition for certiorari in *Seattle University*, however, it should grant the petition in this case.

Respectfully submitted.

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